Certain-Teed Corporation *and* Glass Bottle Blowers Association of the United States and Canada, AFL-CIO. Case 10-CA-15796

March 19, 1981

DECISION AND ORDER

Upon a charge filed on May 6, 1980, by Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, herein called the Union, and duly served on Certain-Teed Corporation, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 10, issued a complaint on June 19, 1980, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on March 13, 1980, following a Board election in Case 10-RC-11650, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about April 25, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On July 21, 1980, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On August 25, 1980, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on August 29, 1980, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to Notice To Show Cause, and amendments thereto, Respondent contends that the Board's disposition of the underlying representation case is in direct conflict with various decisions of the United States Court of Appeals for the Fifth Circuit.[2] In this regard, Respondent contends that it has been denied due process of law because the Board failed to order a hearing after Respondent presented *prima facie* evidence of objectionable conduct which could have or did tend to affect the outcome of the election. Respondent further contends that a genuine issue of material fact exists on the question of whether the Charging Party (herein called the Union) made a valid request to bargain. The General Counsel contends that Respondent's answer raises no issues other than those fully considered by the Board in the underlying representation proceeding and that Respondent is seeking to relitigate such issues. We agree.

Our review of the record herein, including the record in Case 10-RC-11650, discloses that the Union filed a petition for an election on January 22, 1979. Subsequently, the parties entered into a Stipulation for Certification Upon Consent Election which was approved on February 8, 1979. Thereafter, on February 15 and 16, 1979, an election was conducted in an appropriate unit, which resulted in a tally of 180 votes for and 144 against the Union, with 2 challenged ballots, an insufficient number to affect the outcome of the election. The Respondent timely filed objections to the conduct of the election alleging, *inter alia*, that the Union made material misrepresentations to voters at a time which prevented an effective reply by Respondent; that the Union threatened employees and created an atmosphere of fear and violence thereby denying the employees the opportunity for a free choice in the election; that the Board agent allowed campaigning and other acts and conduct in and around the polling area which destroyed the laboratory conditions required for the election; and that the Union offered and/or granted benefits to eligible voters or created the impression that such benefits would be granted to eligible voters if they supported the Union in the election.

On May 14, 1979, the Regional Director issued his Report on Objections in which he recommend-

[1] Official notice is taken of the record in the representation proceeding, Case 10-RC-11650, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondent cites, *inter alia*, *N.L.R.B. v. Polyflex M Company*, 622 F.2d 128 (5th Cir. 1980); *N.L.R.B. v. Claxton Manufacturing Company Inc.*, 613 F.2d 1364 (5th Cir. 1980); *Luminator Division of Gulton Industries, Inc. v. N.L.R.B.*, 469 F.2d 1371 (5th Cir. 1972); *N.L.R.B. v. Mr. Fine, Inc.*, 516 F.2d 60 (5th Cir. 1975); *N.L.R.B. v. Carlton McLendon Furniture Co., Inc.*, 488 F.2d 58 (5th Cir. 1974); *N.L.R.B. v. Smith Industries, Inc.*, 403 F.2d 889 (5th Cir. 1968).

ed, on the basis of an administrative investigation, that Respondent's objections be dismissed in their entirety. Respondent filed exceptions to the Regional Director's report on June 14, 1979, requesting that the Board order a hearing on all its objections. Thereafter the Board issued a Decision and Direction on August 14, 1979,[3] in which it adopted the Regional Director's recommendations that Objections 1, 2, 4, and 5 be overruled, but directed that a hearing be held to resolve issues raised by Objections 3 and 6.[4] Thereafter a hearing was held before a Hearing Officer who recommended that Respondent's Objections 3 and 6 be overruled. Respondent timely filed with the Board exceptions to the Hearing Officer's report, primarily alleging that the Hearing Officer made erroneous credibility resolutions, and requesting that the election be set aside. The Union filed an opposition to Respondent's exceptions.

On March 13, 1980, the Board adopted the Hearing Officer's recommendations that Respondent's objections be overruled, and certified the Union.[5] Respondent filed a motion for reconsideration on April 7, 1980, alleging in substance that, if the Board had been aware of the testimony of one of its witnesses at the September 13, 1979, hearing, it would not have adopted the Regional Director's recommendation that Objection 1 be overruled. The Board thereafter on July 14, 1980, issued an order denying motion for reconsideration.[6]

The Union on April 11 and 22, 1980, and at all times thereafter, requested Respondent to bargain with it as the exclusive representative of the employees in the unit. Respondent since April 25, 1980, has refused to bargain with the Union. Respondent, however, contends in its answer that the Union's bargaining requests were invalid because they were made while Respondent's motion for reconsideration was pending, and it would therefore be improper, premature, and in derogation of its appeal right in the representation case for Respondent to engage in any discussion with the Union concerning collective bargaining.

Respondent further contends that at the time such requests were made there had been no final determination by the Board in the representation case, and the Union has not made any further request for bargaining. Also, Respondent claims that, even if the Union's April requests for bargaining were not invalid, Respondent has never refused to bargain. Finally, in its response to the Motion for Summary Judgment, Respondent contends that material factual issues exist as to these matters.

We find no merit to Respondent's contentions. The Board's March 13, 1980, decision and certification of bargaining representative was final and binding. Respondent's motion for reconsideration did not render that decision any less final; nor did it have the effect of suspending the certification. The Union's requests, therefore, were timely and valid, and, in any event, continuing in their effectiveness. As for Respondent's claim that it has not refused to bargain we conclude that its reply to the Union's requests speaks for itself, as does its subsequent action herein. Accordingly, we find that there are no factual issues remaining to be resolved in this proceeding.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[7]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[8]

[3] Not included in the bound volumes of Board Decisions.

[4] These objections allege that the Union granted benefits to eligible voters or created the impression that such benefits would be granted if the voters supported the Union, and that the Board agent told an employee that he would "appreciate a yes vote."

[5] The Board inadvertently erred by stating at fn. 1 of its Supplemental Decision that an earlier Board (unpublished) decision adopted the Regional Director's report recommending that all objections except Objections 3 and 6 be overruled. In fact, the Regional Director had recommended that all objections be overruled.

[6] With regard to Respondent's contention that certain newly discovered evidence requires the Board to reconsider its two previous panel decisions, the Board found that the allegedly newly discovered evidence was not timely filed, inasmuch as Respondent had available the testimony of its own witness 7 months prior to the filing of the Motion for Reconsideration. The Board further noted that Respondent did not allege the witness' unavailability nor did it submit this evidence to the Board with its original request for reconsideration of the Regional Director's Report on Objections filed in May 1979.

[7] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[8] In its response to The Notice To Show Cause, Respondent contends that the Board's decision ruling on the Regional Director's Report on Objections conflicts with certain precedents of the United States Court of Appeals for the Fifth Circuit (see fn. 2 and cases cited therein). With regard to Respondent's contentions, and after careful examination of Respondent's authorities, we conclude that our disposition of this case via summary judgment is not in conflict with the principles set forth by the Fifth Circuit in this area.

Specifically, we note that, while the Fifth Circuit has ruled that an *ex parte* investigation by the regional director into objectionable conduct is no substitute for a hearing, *Claxton, supra* (which issued after the Board's decision in this case), the Fifth Circuit has also held that the Board has discretion in determining whether an election was fairly conducted. *Gulf Coast Automotive Warehouse Company, Inc.* v. *N.L.R.B.*, 588 F.2d 1096 (5th Cir. 1979). Moreover, whether the employer has made out a *prima facie* showing that objectionable conduct occurred is a question of law. *Luminator Division of Gulton Industries, Inc.* v. *N.L.R.B., supra*. And, it is

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We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent is, and has been at all times herein, a Maryland corporation with an office and place of business at Athens, Georgia, where it is engaged in the manufacture of insulation. In the course and conduct of its business, Respondent during the past calendar year sold and shipped from its Athens, Georgia, facility products, goods, and materials valued in excess of $50,000 directly to finished customers located outside the State of Georgia.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All hourly paid production and maintenance employees employed by the Employer at its Athens, Georgia, facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On February 15 and 16, 1979, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 10, designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on March 13, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about April 11, 1980, and at all times thereafter, including April 22, 1980, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about April 25, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since April 25, 1980, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is

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well settled in administrative law that questions of law are best left to agency discretion.

In *Claxton, supra*, the court held that as a matter of due process an evidentiary hearing must be conducted when, after an election, the losing party files with the regional director evidence which *prima facie* raises substantial and material issues that would warrant setting aside an election. In the instant case the Board considered Respondent's objections and supporting evidence and determined that no hearing was necessary other than on its Objections 3 and 6 on which hearings were held. As noted, the Board adopted the Hearing Officer's recommendation to overrule those objections.

reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. Certain-Teed Corporation is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All hourly paid production and maintenance employees employed by the Employer at its Athens, Georgia, facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since March 13, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about April 25, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Certain-Teed Corporation, Athens, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All hourly paid production and maintenance employees employed by the Employer at its Athens, Georgia, facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Athens, Georgia, facility copies of the attached notice marked "Appendix."[9] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

[9] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted By Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Notify the Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Glass Bottle Blowers Association of the United States and Canada, AFL-CIO, the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

All hourly paid production and maintenance employees employed by the Employer at its Athens, Georgia, facility, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

CERTAIN-TEED CORPORATION